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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~339~~ 10

A. L. DUTTON, Warden,
Georgia State Prison, Reidsville, Georgia,
Appellant,

v.

ALEX S. EVANS,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF APPELLANT

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ALEX S. EVANS,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia, as of this time unreported, is set forth at pages 21 to 25 of the Appendix. The opinion of the Court of Appeals for the Fifth Circuit is reported at 400 F.2d 826 (5th Cir. 1968) and is also set forth in the Appendix at pages 28 to 38 thereof.

JURISDICTION

This action stems from a petition for a writ of habeas corpus filed by Appellee in the United States District

Court for the Southern District of Georgia under 28 U.S.C. § 2241, alleging *inter alia* that Appellee's State court conviction for murder had been obtained in violation of his "confrontation" rights under the Sixth and Fourteenth Amendments.[1] The crux of Appellee's contention involved the admission of testimony of a co-conspirator's declaration into evidence as a statutory exception to the hearsay rule. The case was transferred to the United States District Court for the Northern District of Georgia for hearing and that court held that application of the statute (i.e. Ga. Code Ann. § 38-306) did not violate any of Appellee's constitutional rights, and denied his petition. On appeal the United States Court of Appeals for the Fifth Circuit reversed, holding that said statute, as construed and applied by the Supreme Court of Georgia, did conflict with the "confrontation clause" of the Sixth Amendment. See *Evans v. Dutton,* 400 F.2d 826 (5th Cir. 1968). It is from this last mentioned judgment, rendered on September 16, 1968, that Appellant on September 26, 1968 filed his Notice of Appeal in the Court of Appeals for the Fifth Circuit.

The jurisdiction of the Supreme Court to review the decision of the Court of Appeals on appeal is conferred by 28 U.S.C. § 1254(2). Cases believed by Appellant to sustain this Court's jurisdiction to review the decision on appeal include *United Gas Pipe Line Co. v. Ideal Cement Co.,* 369 U.S. 134, 135 (1962); *City of Detroit v. Murray Corporation of America,* 355 U.S.

[1]The same assertion, along with various others, was rejected by the Supreme Court of Georgia in its affirmance of Appellee's conviction, see *Evans v. State,* 222 Ga. 392, 150 S.E.2d 240 (1966), and Appellee's petition for a writ of certiorari, again urging the point, was denied by this Court. *Evans v. Georgia,* 385 U.S. 953 (1966).

489, 492-93 (1958); and *Watson v. Employees Liability Assurance Corp.*, 348 U.S. 66, 69-70 (1954).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

U. S. CONSTITUTION, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U. S. CONSTITUTION, Amendment XIV

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ga. Code Ann. § 38-306

> "After the facts of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all."

QUESTIONS PRESENTED

1. Whether the hearsay rule, with all of its subtleties, anomalies and ramifications, is to be read into and equated with the "confrontation clause" of the Sixth Amendment?

2. In the event the hearsay rule is now to be construed as a constitutional mandate under the Sixth Amendment, should it be applied to the States under the Fourteenth Amendment in such manner as to require that the nature and scope of even the most settled and long standing State law exceptions to this heretofore evidentiary rule henceforth be restricted to such exceptions and applications as may at some *later* date be thought desirable, under the particular circumstances of the case presented, by a reviewing Federal judge?

3. Did the Court of Appeals err in holding that the State statute providing for a co-conspirator exception to the hearsay rule (i.e. Ga. Code Ann. § 38-306), as construed by the Supreme Court of Georgia to cover the period during which a conspiracy continues for the purpose of concealing a crime, is repugnant to the "confrontation clause" of the Sixth Amendment?

4. Did the Court of Appeals err in reversing the United States District Court in that the testimony in question, in light of the totality of the evidence presented, was so minuscule as to render its admission "harmless error" even if it were to be held to have been improperly admitted under the hearsay rule and "confrontation clause" of the Sixth Amendment?

STATEMENT OF THE CASE

At approximately 1:30 A.M. on April 17, 1964 three police officers of Gwinnett County, Georgia were dispatched to investigate a report of unusual vehicular activity in a rural area of that county. The three officers did not return and around 9:30 A.M. their bodies were found, handcuffed together, in a pine thicket. The bodies bore multiple gunshot wounds, primarily in the back of the head [T. 11-24].[2] Officer Jerry Everett, for whose murder Appellee Evans was subsequently tried and convicted, had received five wounds, with powder burns around those in his head indicating that the fatal shots had been inflicted from a range of only two feet [T. 45-47]. The empty police car in which the three officers had been riding was located in the vicinity as was a burning 1963 maroon or red hardtop Oldsmobile which had been stolen in Atlanta the previous evening [T. 16-26].

After more than a year of intensive investigation Appellee Evans, along with Venson Eugene Williams, was, on August 23, 1965, indicted for the murder of Officer Jerry R. Everett. To the indictment Evans entered a plea of not guilty, elected to be tried separately, and was so tried on October 18-21, 1965.

Evidence adduced during the trial, largely through the testimony of Wade L. Truett (an accomplice), showed the following: Venson Eugene Williams and

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[2] "T." references are to page numbers as they appear in the trial transcript which has been certified by the Clerk of the United States Court of Appeals for the Fifth Circuit as an Exhibit to the record in the instant habeas corpus proceeding. References to pages of the record proper, as prepared for transmittal to the Supreme Court of the United States are indicated with the customary "R."

Truett operated a garage in Hartsville, South Carolina, their business consisting largely of the purchase, repair and sale of wrecked cars. At the time they purchased a badly damaged 1963 model maroon hardtop Oldsmobile in Atlanta, they agreed that the only way in which they could make a profit on the wrecked vehicle would be to steal an identical model and repair the purchased car with parts from the stolen automobile. To assist them in their plan they telephoned Appellee Alex S. Evans, who lived in Gwinnett County, Georgia, relating their need for a 1963 maroon hardtop Oldsmobile [T. 188-193]. Several days later Evans informed Williams and Truett that he had located the required vehicle and they drove to Atlanta, picking Evans up en route. The Oldsmobile was successfully stolen in Atlanta and the three then drove both Williams' car and the stolen car to a rural location of nearby Gwinnett County in order to change license plates and replace the ignition switch on the dashboard of the stolen auto [T. 207-209].

While Truett was changing the license plates on the Oldsmobile the police car and three officers dispatched to investigate the report of unusual vehicular activity arrived on the scene. Shortly thereafter Evans managed to remove a gun from the holster of the youngest police officer who had been bending over in the front seat of the stolen car examining the ignition switch. With this pistol in one hand and his own in the other Appellee Evans ordered all three officers to put up their hands. Williams disarmed the officers and Truett manacled them with their own handcuffs. Truett testified that he then drove the police car back off the road and into some woods, and when returning toward the spot where Evans and Williams had taken the three officers

heard what sounded like a "nickel pack of firecrackers" going off. Arriving at the scene he saw the three officers, still handcuffed together, lying on the ground. One officer was making a peculiar sound and Truett testified that he saw Williams bend over and shoot the officer two or three times more while Alex Evans held a flashlight for him. Williams and Evans set fire to the stolen Oldsmobile and with Truett departed in haste [T. 208-222]. Truett's testimony as to the triple murder was corroborated by physical evidence as well as the testimony of various other witnesses, and the jury found Appellee Evans guilty of murder without recommendation of mercy [T. 422-423].

One of the relatively minor bits of evidence introduced by the State during the trial was the testimony of one Lynwood W. Shaw that on the day following Williams' arraignment, in response to Shaw's question as to how he made out, Williams exclaimed:

> "If it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." [T. 148, Appendix, p. 55].

This testimony was admitted over counsel for Evans' objection that it was hearsay and a denial of his confrontation rights under both the Constitution of the State of Georgia and the Sixth Amendment to the United States Constitution. The trial court held that a *prima facie* showing of a conspiracy had been made and admitted the testimony as the declaration of a co-conspirator, an exception to the hearsay rule under Ga. Code Ann. § 38-306 [T. 141-148, Appendix, p. 54]. The witness Shaw was cross-examined thoroughly by counsel for Evans [T. 149-163, Appendix, pp. 55 to 72].

Subsequent to his conviction Evans appealed to the Supreme Court of Georgia, again urging that the testimony complained of was improperly admitted. In affirming, the Georgia Supreme Court, as the trial court, considered the evidence sufficient to establish a *prima facie* case of a car theft conspiracy, with the killing of the police officers having taken place while the conspiracy was being carried out. The court observed that at the time the statement was made Evans and his co-conspirator Williams were still concealing their identity, keeping secret the fact that they had killed the officers and denying their guilt, with the declaration therefore admissible as a statutory exception to the hearsay rule (i.e. under Ga. Code Ann. § 38-306). See *Evans v. State,* 222 Ga. 392, 402, 150 S.E.2d 240, 248, *cert. denied,* 385 U.S. 953 (1966).

Evans then filed his petition for a writ of habeas corpus with the United States District Court, where once again his contention was rejected. See Appendix, pp. 21 to 25. The District Court concluded that the Constitution did not prescribe what kinds of testimonial statements should be given within the courts, this being merely a matter of the law of evidence for the time being, and held that the declaration, admissible under Georgia law, did not violate any constitutional right of Evans [Appendix, pp. 24-25].

On appeal, however, the United States Court of Appeals for the Fifth Circuit reversed, holding that Georgia's statutory co-conspirator exception to the hearsay rule, as construed by the Supreme Court of Georgia, was repugnant to the Sixth Amendment. [R. 132, Appendix, p. 38]. Noting that the Supreme Court of

the United States had not yet adequately explained "how and when a state hearsay rule exceeds permissible constitutional grounds" [R. 128, Appendix, p. 33], the Court of Appeals proceeded to fashion a test of its own. Apparently adopting as its starting point the view that all hearsay evidence is *per se* a denial of the right of confrontation, the Court of Appeals declared that existing *State* exceptions to the hearsay rule could henceforth be permitted only where under the circumstances of the particular case involved, there are "salient and cogent reasons" to justify the consequential denial of the defendant's right to be confronted by the witnesses against him [R. 130, Appendix, p. 35]. While left unsaid the decision of the Court of Appeals makes it quite clear that the power to make the binding determination as to whether sufficiently "salient and cogent reasons" exist for application of a *State* evidentiary rule in a *State* criminal proceeding, is now to be the *Federal* judiciary, in what must necessarily become routine appellate review and supervision via *habeas corpus* proceedings. The "confrontation clause" of the Sixth Amendment, in other words, has not only been expanded in merely so sweeping a manner as to completely envelop and ossify the hearsay rule into a constitutional mandate, but has indeed been expanded beyond the traditional hearsay rule *coupled with its traditional exceptions,* to the point where even the most widely accepted and settled State law exceptions are to be nullified unless in the eyes of the particular Federal judge or judges reviewing a State conviction, admission of the evidence in question, under the particular circumstances presented, was justified by some "salient and cogent reason."

It goes without saying that the case is one of first impression before the United States Supreme Court.

ARGUMENT

1. The hearsay rule, with all of its subtleties, anomalies and ramifications ought not to be read into and equated with the "confrontation clause" of the Sixth Amendment?

Until now it has never been supposed that the hearsay rule, along with all of its twists and turns, was a constitutional mandate. The traditional view of the "confrontation clause" of the Sixth Amendment has been that it was designed to prevent an accused from being tried upon *ex parte* affidavits or depositions, and require instead that the witnesses who testify against him do so face to face at the trial where they are subject to cross examination. See e.g., *Dowdell v. United States*, 221 U.S. 325, 330 (1911). Until now it was not thought that this constitutional requirement went so far as to control the nature or scope of oral testimony permitted to be given by a witness who is in court and subject to cross examination.[3] This latter aspect of the introduction of evidence in a criminal proceeding has heretofore been left to that far broader evidentiary rule generically described as the hearsay rule. Thus *Wigmore* states:

> "The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially, — this depends

[3]As already pointed out, the witness Lynwood W. Shaw, to whose testimony Appellee Evans objected, testified in open court in the presence of the accused and not only was available for but was indeed subjected to a thorough cross-examination. Evans' objection related solely to the scope of Shaw's testimony (i.e. Shaw's being allowed to testify as to his audio as well as visual perceptions).

on the law of Evidence for the time being, — but only what mode of procedure shall be followed — i.e. a cross-examining procedure — in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially." 5 Wigmore, *Evidence*, § 1397 p. 131 (3d ed. 1940).

This critical distinction between the *competency of testimony* under existing rules of evidence (i.e. hearsay), and the constitutionally required *procedure* by which testimony must be introduced (i.e. through live witnesses who confront the accused and are thus available for cross examination rather than by means of affidavits or depositions), was noted by the Supreme Court of Ohio at least as early as 1856, when it said in *Simmons v. Ohio*, 5 Ohio State 325, 341 (1856):

> "The requirement that the accused shall be confronted, on his trial, by the witnesses against him, has sole reference to the personal presence of the witness, and it in nowise affects the question of the competency of the testimony to which he may depose. When the accused has been allowed to confront, or meet face to face, all the witnesses called to testify against him on the trial, the constitutional requirement has been complied with."

Similarly the Supreme Judicial Court of Massachusetts observed in *Commonwealth v. Gallo*, 275 Mass. 320, 333, 175 N.E. 718, 724 (1931):

> "It [the constitutional requirement] was not designed to affect the settled rules of the common law for determining the competency of evidence under the principle of confrontation of the accused by the witnesses. The general rules of the common law, founded as they are upon 'justice, fitness and expediency,' are designed to meet and be susceptible of being adopted 'to new institutions and conditions

> of society . . . new usages and practices, as the progress of society in the advancement of civilization may require.' "

Thus, says Wigmore, there is no inconsistency between the gradual revision and extension of the various exceptions to the hearsay rule and the constitutional sanction. See 5 Wigmore, *Evidence* § 1397 p. 135 (3d Ed. 1940).

In *Mattox v. United States*, 156 U.S. 237, 241-42 (1895) this Court similarly indicated that the narrower constitutional standard was not to be equated or confused with the broader evidentiary rule. It was said there of the "confrontation clause" of the Sixth Amendment:

> ". . . that provision was made to exclude any evidence by deposition, which could be given orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of common law."[4]

And more recently, in *Stein v. New York*, 346 U.S. 156, 196 (1953), this Court, in reviewing a State murder conviction, flatly rejected a similar attempt to elevate the hearsay rule to a constitutional requirement, saying:

> "The hearsay-evidence rule, with all of its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment."

This is not to contend, of course, that the constitutional standard and broader evidentiary rule are always mutually exclusive. In some instances they obviously do overlap, with certain types of hearsay evidence being of such nature as to fall within the more restricted pe-

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[4]See also *Douglas v. Alabama*, 380 U.S. 415, 418-19 (1965).

numbra of the "confrontation clause." In light of the primary purpose of the constitutional standard being one of preventing trial in criminal cases by *ex parte affidavits or depositions,* for example, it is hardly surprising to find that the admission of documentary hearsay may in some situations be violative of the constitutional right of an accused to confront the witnesses against him. See e.g., *Barber v. Page,* 390 U.S. 719 (1968); *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965). Unlike a live witness a piece of paper cannot be cross-examined.

It is unfortunate yet understandable that the relationship and distinctions between the evidentiary rule and constitutional standard have until now received but a paucity of treatment in the Federal Judiciary. In the Federal courts it obviously mattered little to a criminal defendant whether he obtained reversal by virtue of the court's exercise of its supervisory power respecting an evidentiary rule (i.e. "hearsay") or through the application of a constitutional mandate (i.e. "confrontation"). It is probably accurate to say that the distinction was rather academic in the Federal courts prior to 1965 when *Pointer* first held the "confrontation clause" to be applicable to the States under the Fourteenth Amendment.

But whatever the post-*Pointer* uncertainty may be, Appellant is unaware of any authority supporting the position adopted by the Court of Appeals. By one decision that court has not only expanded the penumbra of the "confrontation clause" to cover all forms and types of hearsay, but has indeed decided that the constitutional requirement goes even further, raising serious questions

as to the continuing validity of even the most settled State exceptions to the heretofore evidentiary rule. According to the Court of Appeals for the Fifth Circuit all such generally accepted exceptions must now be "continually scrutinized and reevaluated" by the *Federal courts* to see if "salient and cogent reasons" existed in each given case to justify their application and the consequential deprivation (according to the Court of Appeals) of an accused's right to confront the witnesses against him. It is assumed, of course, that the Court of Appeals did not intend to disturb those hearsay exceptions recognized by the Federal courts respecting Federal criminal proceedings and that these would continue as automatic exceptions to the "confrontation clause." But such charity is apparently inapplicable to State criminal proceedings. There any application of a State law exception to the hearsay rule must be made by the State trial judge at the peril of a Federal judge deciding sometime in the future that to his way of thinking the State law hearsay exception, under the particular factual situation presented, should not have been applied.

Seemingly the only point of hesitation by the Court of Appeals in its revision of the law of evidence of the various States is the fact that this Court, when applying the "confrontation clause" to the States in *Pointer v. Texas*,[5] failed to go so far. Thus the opinion of the Court of Appeals laments the fact that:

> ". . . neither *Pointer* nor any subsequent decision adequately explains how and when a state hearsay rule exceeds permissible constitutional bounds." [R. 128, Appendix, p. 33].

It might humbly be suggested that perhaps this omis-

[5] 380 U.S. 400 (1965).

sion on the part of this Court is due to the fact that it never imagined that *Pointer* and/or subsequent decisions would be construed as having *wholly* overruled *Stein v. New York*, 346 U.S. 156, 196 (1953), causing the hearsay rule, either with or without its traditional exceptions, to be read into and equated with the "confrontation clause" of the Sixth Amendment.

Certainly it is safe to say that of all of the rules of evidence which could have been selected for elevation to the dignity of a constitutional mandate it would be exceedingly difficult to find one less suitable and less deserving than the hearsay rule. This so-called rule, which has so many exceptions as to render its applicability at least as exceptional as the exceptions, has probably been subjected to more criticism than any other evidentiary rule in existence. Many writers have argued for its outright abolition as a senseless anachronism which by excluding evidence which is both relevant and reliable, more frequently impedes than furthers justice. See, e.g., Weinstein, *Alternatives to the Present Hearsay Rule*, 44 F.R.D. 375 (1967) *Hearsay in Administrative Hearings*, 32 Geo. Wash. L. Rev. 689 (April 1964). Obviously this is the trend in civil proceedings. It is now the general rule in administrative hearings, for example, that hearsay *is* admissible. As stated in *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 690 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949), where hearsay evidence not within any of the recognized exceptions was nonetheless admitted over objection:

> "*The common law exclusionary rules of evidence are not based in constitutional interdictions* and are not applicable to administrative proceedings, even of judicial character, in the absence of statutory requirement." (Italics added.)

Inasmuch as the Sixth Amendment is applicable to the States solely through the fundamental fairness concept of the "due process" clause of the Fourteenth Amendment, and inasmuch as the requirement of "due process" is applicable to both criminal and civil proceedings, it may appropriately be asked how and why the admission of oral hearsay evidence manages to "shock the conscience" or violate "the very essence of a scheme of ordered liberty"[6] in a criminal proceeding while at the same time being deemed perfectly proper in a civil action? Is not the function of the rules of evidence in both civil and criminal proceedings to ascertain the truth? Appellant submits that if anything shocks the conscience it ought to be the retention, not to mention the proposed elevation to a constitutional mandate, of a rule which is unknown in any system of civilized law other than the Anglo-American system, a rule which is roundly criticized by apparently *all* of the leading evidence scholars of the Anglo-American System, and a rule which is at odds with what one would think to be a valid constitutional goal of getting as close an approximation of the truth as possible. See Weinstein, *Alternatives to the Present Hearsay Rule,* 44 F.R.D. 375 (1967); *Hearsay in Administrative Hearings,* 32 Geo. Wash. L. Rev. 689 (April 1964).

In noting the existing confusion concerning the extent to which the hearsay rule and right of confrontation overlap, the writers agree that the two ought not to be equated. The Constitution is too blunt an instrument to regulate the procedural and evidentiary details of criminal prosecutions. See *Friendly, The Bill of Rights as a*

[6]See, e.g., *Rochin v. California,* 342 U.S. 165, 169, 172 (1952); *Bute v. Illinois,* 333 U.S. 640, 659 (1948).

Code of Criminal Procedure, 53 Calif. L. Rev. 929, 953-54 (1965). And in expressing reservations concerning certain language of *Pointer v. Texas* it was said in *Confrontation and the Hearsay Rule*, 75 Yale L. J. 1434, 1436 (1966):

> "Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rule of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well."

In concluding discussion of what we deem to be the Court of Appeals' initial error of expanding the "confrontation clause" so as to cover all hearsay, it must again be stressed that the present case does not involve hearsay consisting of written testimony taken outside the courtroom. Nor does it involve hearsay respecting any sort of extended opinion evidence. The witness Shaw, in court and confronting the accused, testified that in response to his question to Williams he received a particular utterance or exclamation. Constitutionally speaking, Appellant finds it difficult to understand why such testimony as to *what he heard* should be any less favorably received than testimony as to *what he saw*. Both are perceptions through sensory organs. We doubt that the courts would be impressed by argument that the "confrontation clause" prohibits a witness from testifying as to the observed phy-

sical reaction of an individual to a particular question, e.g., flushed face, scowl, or state of rage. Why should testimony as to observed verbal reaction, particularly where as here it is much in the nature of a spontaneous "ouch," be any less constitutional? We think generally speaking that the "confrontation clause" ought not to be expanded to cover all hearsay evidence, and more specifically that it should not in any event be construed so as to prohibit testimony of the sort involved in this case whether or not it was properly admitted under a "recognized" State or Federal exception to the rule.

2. In the event that the hearsay rule is to be construed as a constitutional mandate under the Sixth Amendment, its application to the States under the Fourteenth Amendment ought not be such as to require that the nature and scope of long standing State law exceptions to this heretofore evidentiary rule henceforth be restricted to such exceptions and applications as may at some later date be thought desirable under the particular circumstances of the case presented by a reviewing Federal Judge.

However unfortunate the reading of the hearsay rule into the "confrontation clause" may be in and of itself, the far greater blow to any orderly disposition of criminal cases in State courts lie in the approach of the Court of Appeals toward long standing rules of evidence of the various States respecting exceptions to the hearsay rule. Taking a rather expansive view of *Barber v. Page*, 390 U.S. 719 (1968), the Court of Appeals construed that decision as requiring:

". . . . that the rationale of hearsay exceptions in

criminal cases must be continually scrutinized and reevaluated" [R. 129, Appendix, p. 34].

and then proceeded to fashion as its test for the constitutionality of State hearsay exceptions, the yardstick of whether or not any exception, under the particular circumstances of the case presented, is to the reviewing Federal court's way of thinking justified by "salient and cogent reasons" [R. 130, Appendix, p. 35]. While left unsaid, it must be obvious that this nebulous to say the least standard is in reality nothing less than a transfer from the legislatures and courts of the *States* to the *Federal* judiciary of the power to make policy judgments as to whether a hearsay exception recognized by *State* law should be allowed in any given *State* criminal proceeding.

The disruptive effect of this sort of Federal "second guessing" upon the trial of criminal cases in State courts is not difficult to foresee. No matter how settled a State's rules of evidence may be regarding the hearsay rule, a State trial judge will rarely if ever be able to know in advance whether or not a United States District Court Judge might concude during a subsequent habeas corpus review, perhaps some years later, that under the particular circumstances of the case the reasons for admitting the evidence were not sufficiently "salient and cogent." In view of the difficulty, if not impossibility, of recognizing and excluding all hearsay evidence during the heat of trial, it would be difficult to see how any conviction could ever stand without multiple State court trials and multiple Federal reviews upon habeas corpus "appeals." This Court has already indicated that only a knowing waiver of confrontation rights by an accused will suffice, see *Barber v. Page*, 390 U.S. 719, 725 (1968);

Brookhart v. Janis, 384 U.S. 1, 4-8 (1966), and if hearsay evidence is a denial of the right to confrontation *per se* as the Court of Appeals concludes, it must be assumed that such hearsay as counsel inadvertently or even deliberately fails to object to will (unless such unconstitutionally admitted evidence can be construed to be "harmless error") pollute the entire trial. If it has really come to this, Appellant respectfully submits that in order to save time and money for the Federal and State courts, for counsel, the accused and the taxpaying public, it would be far better to simply have all State criminal violations tried in the Federal courts in the first instance.

If the Court of Appeals is correct in its major premise that "hearsay" and "confrontation" are the same (we insist they are separate and distinct), it is obvious that some intelligible *objective* standards are needed by State trial courts so as to remove the matter from the quagmire into which it has been dropped and in which it now rests. The "second guessing" approach adopted by the Court of Appeals (for application to State courts only) clearly fails to furnish such standards as will permit the orderly disposition of State criminal trials.

3. The Court of Appeals erred in holding that the State statute providing for the co-conspirator exception to the hearsay rule (i.e. Ga. Code Ann. § 38-306), as construed by the Supreme Court of Georgia to cover the period during which a conspiracy continues for the purpose of concealing a crime, is repugnant to the "confrontation clause" of the Sixth Amendment.

The unwisdom of attempting to read the hearsay rule

into the "confrontation clause" of the Sixth Amendment and even greater unwisdom of attempting to subject well settled State exceptions thereto to the amorphous test recommended by the Court of Appeals is well illustrated by the facts and applicable evidentiary law respecting the instant case.

As already pointed out the factual situation is one of a witness testifying in court that when he asked a co-conspirator a particular question he received in reply an exclamation in the nature of an "ouch," which to some slight degree also implicated the accused. In showing that under the generally applicable rules of evidence it was entirely proper to admit such testimony, it may first be noted that it is the rule everywhere that out-of-court declarations of a co-conspirator are ordinarily admissible in the trial of another conspirator. E.g., 22A C.J.S. *Criminal Law* § 754; 31A C.J.S. *Evidence* § 362 (both citations noting that the extent to which the declarations are admissible is to a great extent within the discretion of the trial court). This exception to the hearsay rule has repeatedly been recognized by this Court. E.g., *Schine Chain Theatres, Inc. v. United States,* 334 U.S. 110, 116-117 (1948); *Hitchman Coal & Coke Co. v. Mitchell,* 245 U.S. 229, 249 (1917). In Georgia it is provided for by statute. Ga. Code Ann. § 38-306 declares:

> "After the fact of conspiracy shall be proved the declarations of any one of the conspirators during the pendency of the criminal project shall be admissible against all."

Concerning the nature of the declaration, the only requirement is one in the nature of relevancy. It must re-

late to the conspiracy or acts done in furtherance of the conspiracy. As stated in *United States v. E. I. Du Pont de Nemours & Co.*, 107 F.Supp. 324, 325 (D. Del. 1952):

> "A declaration of a co-conspirator is admissible even though made only to other members of the co-conspirator's organization or to other third parties. Du Pont contends, however, the criterion of admissibility of the declaration is 'the making' and the statement can only come in if 'the making' is itself 'in furtherance of the conspiracy'. I think it sufficient for purposes of admissibility if the subject matter of the co-conspirator's admission relates to the purpose of the conspiracy *or is explanatory of acts done in furtherance of the conspiracy. Thus, a statement by a co-conspirator to a third party concerning some act done in furtherance of the conspiracy is admissible although the actual making of the statement in no way furthered the conspiracy.*" (Italics added.) [7]

A second generally recognized limitation, and one which is expressly included in the Georgia statute, is that the declaration must be made during the pendency of the conspiracy. Here, however, a divergence of opinion appears. The general rule appears to be that pendency includes both the period of planning prior to the time of the overt act or acts *and the subsequent period where the thrust of the criminal project is to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense.* E.g., *Reed v. People*, 156 Col. 450, 402 P.2d 68, 71 (1965); *Smaldone v. People*, 103 Col. 498, 88 P.2d 103 (23) (1939); *Dailey v. State*, 233

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[7]See also *Wiborg v. United States*, 163 U.S. 632, 658 (1896) (noting that the admissibility of such evidence is largely within the discretion of the trial court).

Ala. 384, 171 So. 729, 731 (1937); *State v. Roberts*, 95 Kan. 280, 147 P. 828 (8) (1915); 16 C.J. *Criminal Law* § 1318, pp. 661-62; 22A C.J.S. *Criminal Law* § 770, pp. 1165, 1167. As stated in 2 Wharton, *Criminal Evidence* § 430 (12th ed. 1955):

> "The acts and declarations of a conspirator are admissible against a co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense, but also its subsequent concealment.
>
> . . . .
>
> "The theory for the admission of such evidence is that persons who conspire to commit a crime, and who do commit a crime, are as much concerned, after the crime, with their freedom from apprehension, as they were concerned, before the crime, with its commission: the conspiracy to commit a crime devolves after the commission thereof into a conspiracy to avoid arrest and implication."

Georgia has long followed the general rule, e.g., *Chatterton v. State*, 221 Ga. 424 (5), 144 S.E.2d 726 (8) (1965), *cert. denied*, 384 U.S. 1015 (1966); *Carter v. State*, 106 Ga. 372, 376-77, 32 S.E. 345, 347 (1899); *Byrd v. State*, 68 Ga. 661, 662 (1881), and when Appellee in the instant case urged his objection to the Supreme Court of Georgia, that Court, after first quoting the pertinent statute (i.e. Ga. Code Ann. § 38-306), rejected his assertion, saying:

> "The rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered

so much a unit that the declarations of either are admissible against the other."[8]

It is recognized, of course, that the co-conspirator exception has been restricted to a narrower scope in the Federal courts. There the conspiracy is viewed as terminating with the completion of the last overt act in furtherance thereof. E.g., *Grunewald v. United States*, 353 U.S. 391, 399-402 (1957); *Krulewitch v. United States*, 336 U.S. 440, 443-444 (1949); *Fiswick v. United States*, 329 U.S. 211, 217 (1946). But the rule has not heretofore been interpreted as a rule of constitutional dimension. Quite to the contrary, this Court expressly noted in *Krulewitch* that it was dealing simply with an *evidentiary rule* to be applied in the Federal courts and took cognizance of the fact that many States, including Georgia, did adhere to the view that "pending" included the period during which the conspirators sought to conceal the crime. See *Krulewitch v. United States, supra* at 443-44.

Moreover, assuming that the Court of Appeals is not attempting to reverse the previously cited decisions of this Court which do allow the admission into evidence of at least those co-conspirator declarations which clearly are made prior to the time of the last overt act of the conspiracy, it would seem to Appellant to be a strange constitutional doctrine which would cause admissibility of co-conspirator Williams' declaration to turn on "time of utterance," which is to say whether it was made before or after the last overt act. Such an artificial criterion obviously bears little relationship to the "trustworthiness" rationale which is usually employed to justify

[8] *Evans v. State*, 222 Ga. 392, 402, 150 S.E.2d 240, 248; *cert. denied*, 385 U.S. 953 (1966).

hearsay exceptions. As pointed out by the Supreme Court of Georgia on direct review:

> "The defendant, and his co-conspirator Williams, at the time this statement was made, were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt." *Evans v. State,* 222 Ga. 392, 402, 150 S.E.2d 240, 248, *cert. denied,* 385 U.S. 953 (1966).

The "trustworthiness" of the declaration lies in the fact that it was a spontaneous exclamation and declaration against Williams' penal interest. Statements against penal interest of this nature are ordinarily not uttered unless true. See *Newberry v. Commonwealth,* 191 Va. 445, 61 S.E.2d 318, 326 (1950); 31A C.J.S., *Evidence* §§ 217, 219, p. 688; *Accord, Opper v. United States,* 348 U.S. 84 (1954). Surely the level of "trustworthiness" here is greater than in the case of the "dying declaration" exception to the hearsay rule which has been recognized by this Court in *Mattox v. United States,* 146 U.S. 140, 151 (1882) and *Pointer v. Texas,* 380 U.S. 400, 407 (1965). In the latter situation "trustworthiness" rests primarily upon the somewhat questionable assumption that a person about to die will not lie. See 5 Wigmore, *Evidence* § 1438 (3d Ed. 1940). And how much more reliable is the instant hearsay than that regarding a person's "reputation in the neighborhood," so frequently admitted in criminal proceedings. See 22A C.J.S. *Criminal Law* § 676; 32 C.J.S. *Evidence* §§ 434, 436. Of such reputation evidence this Court correctly observed in *Michelson v. United States,* 335 U.S. 469, 477 (1948):

> "Not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not al-

> lowed to base his testimony on anything but hearsay . . . The witness may not testify about defendant's specific acts or courses of conduct . . . nor can he testify that his own acquaintance, observation, and knowledge of defendant leads to his own independent opinion that defendant possesses a good general or specific character, unconsistent with commission of acts charged. This witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge them himself."

Appellant submits that if the declaration of a co-conspirator against his penal interest in the case at hand cannot pass muster under the confrontation clause, it would be most illogical to hold that the above cited and other less reliable forms of admissible hearsay can.

Finally, it is respectfully submitted that it is of no small importance, particularly in times of mass disorder and group lawlessness, that the States be permitted to retain the broader concept of the co-conspirator exception. One illustration of the salubrious nature of construing the term "pendency" so as to include the period of concealment of the crime is *Bryant v. State,* 65 Ga. App. 523, 16 S.E.2d 241 (1941). There it was shown that members of the Ku Klux Klan, including the defendant on trial, had conspired to flog certain individuals. The Court of Appeals held that one of the victims, appearing as a witness, could properly testify that on the morning after he was flogged (i.e. after the primary object or final overt act of the conspiracy took place), he had been warned by one of defendant's co-conspirators not to say anything about the flogging or he might receive an even worse beating. Such testimony relating to the post overt-act period where there exists

agreement or concert of action to conceal the crime can in many cases be of considerable assistance in shedding light on the matter. Since this is the purpose of all evidence Appellant submits there is no valid policy reason to eliminate this long standing exception to the hearsay rule and that the Court of Appeals erred in holding Georgia's statute, as construed by its Supreme Court, to be unconstitutional.

4. The Court of Appeals erred in reversing the United States District Court in that the testimony in question, in light of the totality of the evidence presented, was so minuscule as to render its admission "harmless error" even if it were to be held to have been improperly admitted under the hearsay rule and/or "confrontation clause" of the Sixth Amendment.

It has frequently been held that where the guilt of an accused is established beyond a reasonable doubt by competent evidence, the admission of other evidence which is for some reason incompetent is not prejudicial to an accused and does not constitute ground for reversal, particularly where the improperly admitted evidence is merely corroborative. See *Segurola v. United States,* 275 U.S. 106 (3) (1927); 24B C.J.S. *Criminal Law* § 1915 (5). It is Appellant's contention that even if the Court of Appeals was correct in its view that the Sixth Amendment's "confrontation clause" must now be expanded to cover all hearsay evidence, the testimony here in question was such a minuscule part of the overwhelming mass of evidence of Appellee's guilt as to preclude any possibility that it could even remotely have affected the jury's verdict. A study of the record makes

it clear beyond all doubt that Appellee was convicted by the testimony of an accomplice who was an eye witness to the murders, with such testimony being corroborated by an abundance of physical evidence plus the testimony of numerous other witnesses. The somewhat cryptic but possibly mildly implicating testimony of the witness Shaw to which Appellee objected was entirely corroborative in nature and far less than the proverbial drop in the bucket of the State's evidence. Looking at the record as a whole it is obvious that no substantial risk exists of Appellee Evans having been prejudiced by the particular exclamation in question.

It is respectfully submitted that under all of the facts and circumstances of this case, reversal on the ground that constitutional error, if any, was "harmless error," would be consistent even under the restrictive view of the doctrine which this Court enunciated in *Chapman v. California,* 386 U.S. 18, 23-24 (1967) and *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963).

CONCLUSION

This case presents substantial questions as to the meaning of the Sixth Amendment's "confrontation clause" and the extent to which the heretofore evidentiary rules of the States respecting hearsay may continue to be utilized in State criminal proceedings. In the absence of reversal or considerable clarification of the nebulous standards which have been adopted by the Court of Appeals for the Fifth Circuit, that Court's decision will at the very least prove to be extraordinarily disruptive to the orderly disposition of criminal proceedings in the State courts for all of the reasons stated. The

judgement of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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